IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RONDI BENNETT, an individual, and GERALD HORROBIN, an individual,	)	
Plaintiffs,	)	
and	)	No. 84903-0
D. EDSON CLARK,	)	En Banc
Petitioner,	)	
v.	)	
SMITH BUNDY BERMAN BRITTON, PS, a Washington professional services corporation, and SHARON ROBERTSON, individually and her marital community,	)	
Respondents.	)	Filed January 10, 2013

CHAMBERS, J.* — Article I, section 10 of the Washington State Constitution declares, "Justice in all cases shall be administered openly, and without unnecessary delay." Under this straightforward directive, court records that become part of the administration of justice may be kept from the public only upon a showing of some compelling need for secrecy. But not all records are subject to this constitutional command. Documents obtained through the discovery process may be

*Justice Tom Chambers is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

sealed for mere good cause shown. This good cause standard helps protect sensitive information, including information of nonparties, that might never be used in litigation. However, once material becomes part of the administration of justice, article I, section 10 requires disclosure unless a party shows a more compelling need for secrecy than mere good cause.

The case before us was settled before the trial court made any decision. We must decide if records sealed for good cause and submitted in support of a motion that was never decided became part of the administration of justice and are thus presumptively public. We affirm the Court of Appeals, *Bennett v. Smith Bunday Berman Britton, PS,* 156 Wn. App. 293, 234 P.3d 236 (2010), and hold that only material relevant to a decision actually made by the court is presumptively public under article I, section 10. In the absence of a decision by the court, the records in question here are not part of the administration of justice and may remain sealed for good cause.

FACTS

This case illustrates how litigation may take unexpected twists and turns. The case began as a marriage dissolution. The firm Smith Bunday Berman Britton PS (Smith Bunday) provided accounting services to Todd and Rondi Bennett during their divorce. Rondi Bennett and her father, Gerald Horrobin, owned businesses jointly with Todd Bennett. Smith Bunday also provided accounting services for those businesses. Rondi and Gerald (for the sake of clarity we will refer to these parties collectively as Horrobin) filed suit against Smith Bunday alleging it had aided Todd Bennett in embezzling and hiding money that belonged to Horrobin.

As part of discovery, the plaintiffs requested tax records of nonparties to the suit. Smith Bunday objected to the discovery on ground that it was prohibited by law from revealing a person's tax information without that person's consent.

To resolve the confidentiality problem, the plaintiffs proposed a protective order. The order, stipulated to by both parties, and signed by the trial judge, permitted the parties to stamp any documents they produced as "confidential." Such documents, according to the protective order, could then be used in conjunction with briefs, motions, and other court filings only if the documents were filed separately under seal.

On October 7, 2008, Smith Bunday filed a motion to dismiss all of the plaintiffs' claims on summary judgment. On October 29, Horrobin moved to remove certain documents from the protective order so they could be attached unsealed to the plaintiffs' response to the summary judgment motion. In particular, Horrobin wanted to attach some of the documents marked "confidential" to a declaration of the plaintiffs' expert witness, Ed Clark, in support of the response. The trial court ordered that the documents should be filed under seal first, and then upon receipt, the court would examine them and determine whether they should remain subject to the protective order. On November 14, 2008, Horrobin filed the response to the summary judgment motion and Clark's supporting declaration.

Just a few hours after the response was filed, and before the court had examined either the summary judgment motion or response, the parties settled the case. Smith Bunday notified the court that the case had been settled and that its summary judgment motion should be removed from the calendar.

Settlement did not bring resolution. Smith Bunday noticed that Horrobin's response and supporting declaration contained or made reference to documents that had been stamped "confidential," but Horrobin had not filed them under seal as required by the stipulated protective order. This was apparently accidental. After discussing the matter, and despite the fact the case had settled, the parties stipulated the plaintiffs would refile redacted and sealed versions of the response and declaration in accordance with the stipulated protective order.

The plaintiffs' expert, Clark, who wrote the declaration in support of the response to summary judgment, moved to intervene. He asserted his right as a member of the public to open access to court records, opposed the refiling under seal, and moved to unseal other documents in the case already filed under seal.[1] The trial court granted his motion to intervene but denied his motion to unseal. Clark appealed, and the Court of Appeals upheld the trial court's order. Clark petitioned this court, and we accepted review.

ANALYSIS

Standard of Review

A trial court's decision to seal records is reviewed for abuse of discretion. *Dreiling v. Jain*, 151 Wn.2d 900, 907, 93 P.3d 861 (2004) (citing *King v. Olympic Pipe Line Co.*, 104 Wn. App. 338, 348, 16 P.3d 45 (2000)). But the proper standard governing the sealing of court records is a legal question we review de novo. *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005). If the trial court

[1] Clark's motivation for intervening after the settlement is not entirely clear. He asserts in his brief that he intervened in this case "when he realized after a settlement that numerous court filings were sealed and everything was about to go underground." Appellant's Suppl. Br. at 2-3. Whatever Clark's motivation it is not relevant to our resolution of this case.

reached its decision by applying an improper legal standard, we will remand to the trial court to apply the correct rule. *Id.*

Presumption of Public Access

There are, for purposes of the case before us, two different standards for sealing documents. "Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984). Such information may implicate privacy interests of both litigants and nonparties. To protect such interests, "[b]ecause of the liberality of pretrial discovery[,] . . . it is necessary for the trial court to have the authority to issue protective orders." *Id.* at 34. Thus, under our civil rules, parties may seal discovery material "for good cause shown." CR 26(c).

At some point, material that is sealed for good cause during discovery may become part of the administration of justice, and at that point, a stricter standard of sealing must be applied. A party may, for example, file material sealed for good cause in discovery along with and in support of a motion. We have recently decided several cases addressing the effect of such filing on the public's right of access to the records.

Not long ago we held in *Dreiling*, in accordance with federal case law, that documents filed in support of dispositive motions, such as a motion for summary judgment, cannot remain sealed under a mere good cause standard; rather, they become presumptively public. *Dreiling*, 151 Wn.2d at 909-10, 915. We explained that presumptive publicity was guaranteed by article I, section 10 of our state

constitution, which provides the public a right of access to court documents as well as a right of physical access to courtroom proceedings. *Id.* at 908-09 (citing Const. art. I, § 10). Article I, section 10 applies and renders documents presumptively public when the documents cross the line from "unfiled discovery" to "documents filed in support of a motion that can potentially dispose of a case." *Id.* at 912 (emphasis omitted). We ultimately held that where article I, section 10 applies to documents, courts must engage in an *Ishikawa* analysis[2] to determine whether sealing is permissible. *Id.* at 915.

In *Rufer*, 154 Wn.2d 530, we went further, holding that "any records that were filed with the court in anticipation of a court decision (dispositive or not) should be sealed or continue to be sealed only when the court determines—pursuant to *Ishikawa*—that there is a compelling interest which overrides the public's right to the open administration of justice." *Id.* at 549. The difference between *Rufer* and *Dreiling* is that *Rufer* dropped the "dispositive" distinction and required an *Ishikawa* analysis for sealing documents filed with the court in anticipation of any decision. We conceded this went beyond the federal cases but noted that our unique open courts provision provided "good reason to diverge from federal open courts jurisprudence." *Id.* Thus, *Rufer* provided an extra level of protection for the openness of our courts but did not alter the underlying principles we established in *Dreiling*.

In the case before us, we are asked to extend the constitutional command that

[2] In *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982), we held that the public's right of access to court records may be limited only if the proponent of secrecy can show a compelling need for sealing. Whether sealing is warranted turns on a five factor test intended to balance the public's right of access against other countervailing interests. *Id.*

"[j]ustice in all cases shall be administered openly" to documents submitted in anticipation of a ruling by a court that was never made. Wash. Const. art. I, § 10. Perhaps more broadly, the question before us is: does the act of filing documents with the court itself render the documents presumptively public?

As we pointed out in *Dreiling*, "Our founders did not countenance secret justice. '[O]perations of the courts and the judicial conduct of judges are matters of utmost public concern.'" *Dreiling*, 151 Wn.2d at 908 (alteration in original) (quoting *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 839, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978)). The public, including the press, is entitled to be informed as to the conduct of the judiciary and judges. Scrutiny by the public is a check on the conduct of judges and of the power of the courts. But the act of filing a document does not alone transform the document into a public one. The key to distinguishing information to which article I, section 10 applies is not the act of filing, but whether or not the information becomes "part of the court's decision making process." *Id.* at 909-10. Simply put, information that does not become part of the judicial process is not governed by the open courts provision in our constitution.

Relevance to the Merits

What, then, does it mean for information to become part of the court's decision making process? *Rufer* provides a partial answer: relevancy to the motion before the court. In *Rufer*, we expressly considered a scenario in which parties "use the motions and pleadings process to embarrass or harass other parties by attaching confidential documents produced by other parties which may not be relevant to the underlying motion." *Rufer*, 154 Wn.2d at 547. One of the parties in *Rufer* argued

that it would be "unfair that those documents would be entitled to a strong presumption of openness by virtue of their attachment to a dispositive motion." *Id*. We explained that documents irrelevant to the merits of a case are, on balance, not subject to disclosure:

> We have already held that article I, section 10 is not relevant to documents that do not become part of the court's decision making process. *Dreiling*, 151 Wn.2d at 909-10. Thus, if a record is truly irrelevant to the merits of the case and the motion before the court, the court would not consider the document in evaluating the motion before it, and in applying *Ishikawa* it would likely find that sealing is warranted. As long as the opposing party has a valid interest in keeping the information confidential, there is very little, if any, interest of the public or the moving party to balance against that asserted interest.

Id. at 548. *Rufer* here plainly states article I, section 10 applies only to documents relevant to the merits of the motion before the court. Further, *Rufer* explains that applying *Ishikawa* to irrelevant documents is appropriate because when *Ishikawa* is applied to truly irrelevant documents, the test always comes out in favor of nondisclosure. Thus, *Rufer* is clear that the public has no constitutional interest under article I, section 10 in documents not relevant to the merits of a motion.

Relevance to a Decision

Relevancy to the merits of the motion is not the end of the story. *Rufer* establishes that documents must be relevant to the merits of a motion to be subject to the public's article I, section 10 interest. But this condition of relevancy is only necessary, not sufficient. Filing documents, whether relevant or irrelevant, does not alone make the documents part of the court's decision making process. In order for documents to become part of the decision making process, there must be a decision.

Documents filed with the court that do not become part of the decision making process of the judge, and are unrelated to the conduct of the judiciary, do not implicate article I, section 10. Both *Dreiling* and *Rufer* confirm this view. In *Dreiling*, we held that article I, section 10 does not apply to information that "does not become part of the court's decision making process." *Dreiling*, 151 Wn.2d at 910. Similarly, in *Rufer*, we held that openness requires the public "be afforded the ability to witness the *complete* judicial proceeding, including all records the court has considered in *making any ruling*, whether 'dispositive' or not." *Rufer*, 154 Wn.2d at 549 (emphasis added).

Here, as in *Dreiling* and *Rufer*, some conduct by the judge or judiciary is necessary for the public's constitutional interest in the proceedings to arise.[3] The public right of access does not arise only because documents are relevant with respect to a motion in support of which they are filed. As we stated in *Rufer*, "[I]f a

[3] By using the term "conduct," we do not mean to suggest that only an affirmative act by the court in relation to documents renders them public. The meaning of "conduct" is broad and can include omissions and failures to act. Black's Law Dictionary 336-37 (9th ed. 2009). There may be other circumstances where the conduct of the judiciary as a whole could well create a constitutional public interest in certain relevant records.

record is truly irrelevant to the merits of the case and the motion before the court, the court would not consider the document in evaluating the motion before it." *Id.* at 548. Irrelevant documents are not subject to article I, section 10 precisely because such documents would not be considered during the decision making process. Documents therefore must ultimately be relevant to the decision of the court on the merits of the motion, not merely to the motion itself, for article I, section 10 to apply.

We hold that only material relevant to a decision or other conduct of a judge or the judiciary is subject to a presumption of public access under article I, section 10. Because the public has no constitutionally guaranteed interest in material truly irrelevant to any actual decision, such as the material at issue here, an *Ishikawa* analysis will invariably favor nondisclosure of irrelevant material.

Ishikawa's Five Part Test

The open administration of justice has been the subject of several of this court's opinions in recent years. It is, for example, incumbent upon the trial judge not to close the courtroom to the public without full consideration of the factors enumerated in *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). *See also In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). The trial judge has a similar responsibility relating to the public's right of access to documents filed with the court. We have very liberal rules of discovery. In reality, parties are required to produce many more records than are ultimately relevant to the specific issues before the court. "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought

appears reasonably calculated to lead to the discovery of admissible evidence." CR 26(b)(1). Often, billings, claims files, incident reports, accident reports, or, as in this case, the personal financial information of people who have no meaningful connection to the litigation are subject to discovery.

The public's right to the open administration of justice does not automatically grant the public a right to see all documents produced during the discovery process, or even all those filed with the court. Documents may be privileged, contain proprietary trade secrets, or may simply contain sensitive information such as medical records, social security numbers, or the identities of victims. Both parties to the litigation and nonparties may have significant interests in maintaining such records' confidentiality. As when a courtroom is closed, it falls to the trial judge to assure the many interests and rights implicated by the potential disclosure of documents are properly considered.

The tool we have provided to the trial courts for balancing the public's right of access against privacy interests is the five-part test we laid down in *Ishikawa*, 97 Wn.2d at 36. *Ishikawa*, decided 30 years ago, involved a murder trial, the closure of a courtroom during a pretrial motion, and the sealing of the transcript of that motion. We take this opportunity to review those factors in the context of sealing or unsealing records previously sealed for good cause in a civil case such as the one before us.

1. *The proponent of closure and/or sealing must make some showing of the need therefore*

The burden is upon the party seeking closure to state the interests or rights

giving rise to a need for secrecy. *See Rufer*, 154 Wn.2d at 544. Application of this first *Ishikawa* factor will be simple if the trial court follows the procedures we laid out for sealing discovery in *Dreiling*.

In *Dreiling*, we expressly adopted the position of the Ninth Circuit Court of Appeals that blanket protective orders are to be discouraged and that the proponent of sealing must make a good cause showing for each individual document it seeks to protect. *Dreiling*, 151 Wn.2d at 916-17 (citing *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130-31 (9th Cir. 2003)). We plainly stated that "[p]articularized findings must be made by the trial court to support meaningful review." *Id.* at 917.

Given our open court jurisprudence, and our requirement of particularized findings, the better practice for trial courts is to require every request for the sealing of documents for good cause to be accompanied by a document log identifying each document by number. For each document, the log should state the basis for protection and interest sought to be protected and identify support for assertions in the record. The log should also include a statement as to why redaction or other less restrictive measures than sealing will not protect the interest. If the record implicates a nonparties' interest, the judge may wish to require the identification of nonparties who have interests in the document and to determine whether such nonparties have been or should be notified of the potential disclosure.

Such a procedure at the time documents are sealed for good cause will facilitate any in camera review at the time of sealing, facilitate future motions under *Ishikawa*, and facilitate appellate review.

2. *Anyone present when the closure or sealing motion is made must be given an opportunity to object*

As we stated in *Dreiling*, "'For this opportunity to have meaning the proponent must have stated the grounds for the motion with reasonable specificity, consistent with the protection of the right sought to be protected.'" *Id.* at 914 (quoting *Ishikawa*, 97 Wn.2d at 38). Once again, a document log and particularized findings made at the time documents are sealed for good cause will facilitate meeting this requirement.

3. *The court, the proponent, and the objectors should carefully analyze whether the requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened*

"Entire documents should not be protected where mere redaction of sensitive items will satisfy the need for secrecy." *Id.* at 917. For example, depending on the purpose for which documents are sought in discovery or submitted to the court in support of rulings, it may suffice to redact names or identifying information of individuals or entities while leaving the documents as a whole unsealed.

4. *The court must weigh the competing interests of the parties and the public and consider the alternative methods suggested*

Ishikawa and our subsequent cases had no need to account for protecting nonparty information. *Rufer*, for example, does not consider that someone other than the opposing party might have "a valid interest in keeping the information confidential." *Rufer*, 154 Wn.2d at 548. This case reveals how nonparty information may require protection.

As this case illustrates, the records of nonparties may be produced in discovery. Unlike the case before us, most litigants who produce records have no duty to protect the confidentiality of those whose records are produced. Even if a company has a privacy disclosure policy, those sorts of policies generally permit the disclosure of information as "required" or "permitted" by law. It is likely that compliance with court rules of discovery satisfies all such policies. There is no requirement that those whose private information is being disclosed be notified.[4]

Here, the certified public accounting firm that produced client tax returns was duty- and statute-bound to protect those records. But in other cases, there may be no advocate for nonparties whose sensitive records have been produced in discovery. The party who originally sought to produce the records under seal for good cause may have little incentive, because of insolvency or some other reason, to advocate under the *Ishikawa* factors on behalf of nonparties. We therefore add to this factor consideration of the interests of nonparties whose records may be disclosed.

Depending upon the circumstances of the case and whether anyone is advocating for nonparties, a trial judge may consider requiring notice and an opportunity for nonparties to assert any interest they may have in nondisclosure. Again, the court's considerations and findings should be particularized. *See People v. Jones*, 47 N.Y.2d 409, 415, 391 N.E.2d 1335, 418 N.Y.S.2d 359 (1979).

5. *The order must be no broader in its application or duration than necessary to serve its purpose*

[4] The Public Records Act, on the other hand, does provide for such a requirement. "An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested. However, this option does not exist where the agency is required by law to provide such notice." RCW 42.56.540.

If the court does enter an order sealing documents, it should be limited in time with the option of the proponent to renew the request to seal. However, with or without an expiration date, an order to seal is always subject to challenge consistent with our open administration of justice jurisprudence.

CONCLUSION

Smith Bunday during discovery produced documents, including those containing private information of nonparties. According to the stipulation of both parties, the documents were stamped "confidential" and filed, or were about to be filed, under seal in support of a response to a motion for summary judgment. The court never made any decision involving the disputed information. Instead, the case settled just a few hours after the response and supporting material were filed. The supporting material cannot be relevant to a nonexistent decision. We hold that because the information at issue in this case was not relevant to any decision made by the court, it is not presumptively public under article I, section 10. We remand to the trial court for further proceedings consistent with this opinion.

AUTHOR:
Tom Chambers, Justice Pro Tem.

WE CONCUR:

Justice Charles W. Johnson

Justice Charles K. Wiggins

Justice James M. Johnson